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Supreme Court, U.S.
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No. 01-1662

In The

Supreme Court of the United States

GRID RADIO and JERRY SZOKA,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,

Respondents.

On Petition for Writ Of Certiorari To The
United States Court Of Appeals
For The D.C. Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

I. RESPONDENTS HAVE ABANDONED THE HOLDING OF THE COURT BELOW.

The respondents do not, and cannot, defend the essential holding of the Court of Appeals: that a licensing scheme's unconstitutionality must be "indisputably clear" under prior Supreme Court decisions before a speaker may rely on its unconstitutionality as a defense against large fines and other punishment for speaking without a license. As we noted in the Petition, that holding squarely conflicts with this Court's decisions and the decisions of other circuit courts. *See* Pet. at 14-18. The respondents never even attempt to defend this assertion, although it is the essential premise of the D.C. Circuit's ruling in their favor.

II. RESPONDENTS' OWN ARGUMENTS ARE MERITLESS.

Instead, respondents attempt to provide alternative rationales for the result reached by the Court of Appeals. All of these rationalizations fail on their own terms. Furthermore, since the D.C. Circuit will no doubt follow its own rationale (and not respondents') in future cases, these rationales do not provide any good reason to deny the petition.

A. First, respondents attempt to rely on an even more radical proposition: that irrespective of a licensing scheme's unconstitutionality, a speaker cannot rely on its unconstitutionality as a defense at all, if it involves broadcast speech. National Association of Broadcasters Brief ("NAB Br.") at 4-7; Brief for the Federal Respondents ("FCC Br.") at 9-12. They believe this radical result follows naturally from the settled rule that there is

no right to broadcast without a license. They are wrong.

When there are fewer opportunities for speech than there are speakers, a licensing scheme is needed to provide a fair means of allocating scarce opportunities for speech. Thus, there is no First Amendment right to hold a rally in a public park without a license, *Thomas v. Chicago Park District*, 122 S. Ct. 775 (2002), to parade in a public street without a license, *Cox v. New Hampshire*, 312 U.S. 569, 576-77 (1941), or to broadcast without a license, *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943), because opportunities for speech in these fora are inherently limited. But that does not mean that unlicensed speech or broadcasts can be punished when the licensing scheme itself is unconstitutional. As the court below conceded, "the Constitution permits a person faced with an unconstitutional licensing law to 'ignore it and engage with impunity in the exercise of the right of free expression for which the law purports to require a license.'" *Grid Radio v. FCC*, 278 F.3d 1314, 1320 (Pet. App. A9), *quoting Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 151 (1969). As we previously noted, the unconstitutionality of a licensing scheme has always been a defense to its enforcement. Pet. 15-16 (citing cases).

The respondents argue that even if the microbroadcasting ban is unconstitutional, any challenge to its enforcement is foreclosed by the observation in *National Broadcasting Co. v. United States*, 319 U.S. 190, 227 (1943), that the "right of free speech does not include . . . the right to use the facilities of radio without a license." But this observation only meant that the licensing of broadcasters under the Communications Act is not *per se* unconstitutional, not that unlicensed speakers can be punished under unconstitutional FCC regulations. The Court

said this only after rejecting every other statutory and constitutional objection to the regulations, in response to the argument that "[t]he [FCC's chain broadcasting] Regulations, *even if valid in all other respects*," violated the First Amendment because "every person whose application for a license to operate a station is denied by the commission is thereby denied his constitutional right to free speech." *Id.* at 227 (emphasis added).

While *National Broadcasting* upheld the validity of requiring a license to broadcast, the Court rejected the premise that the lack of a license prevents a broadcaster from challenging an unreasonable licensing restriction: "Congress did not authorize the Commission to choose among applicants upon the basis of their political, economic, or social views, or upon any other capricious basis. If it did, or if the Commission by these regulations proposed a choice among applicants upon such a basis, the issue before us would be wholly different." *Id.* The micro-broadcasting ban petitioners challenge in this case is an example of just the sort of arbitrary regulation condemned in *National Broadcasting*. It denied licenses to small broadcasters based on their size, even though doing so left unnecessary gaps in the electromagnetic spectrum too small to be used by full-power broadcasters. That wasted spectrum, and violated the FCC's duty under the First Amendment to make the spectrum available for speech.

Under the respondents' construction of *National Broadcasting*, no denial of licenses, no matter how arbitrary -- for example, excluding all African American or Democratic applicants -- would be subject to challenge in an enforcement proceeding. Not surprisingly, even the court below rejected that view.

Respondents claim that allowing unlicensed broadcasters to challenge enforcement of unconstitutional regulations will lead to chaos. NAB Br. 10; FCC Br. 5. This defies common sense. *See* Pet. 16. Chaos would not ensue, because most people are not willing to risk the punishment that would be imposed if their view of the Constitution turns out to be wrong. Moreover, unlicensed demonstrations are much more likely to cause disorder than broadcasts, *see, e.g.*, Jim Brunner, *$9.3 Million Bill from WTO Bound to Swell with Claims Against City*, Seattle Times, June 25, 2000 ($20 million in damage from anti-WTO demonstrations); *Cox*, 312 U.S. at 576 (licensing is needed "to prevent confusion by overlapping parades or processions, to secure convenient use of the streets by other travelers, and to minimize the risk of disorder"), yet the law is clear that unlicensed demonstrators can raise constitutional defenses to licensing schemes. *See Shuttlesworth, supra.*

B. In our petition, we cited a long line of cases from this Court holding that unlicensed speakers can challenge the constitutionality of licensing schemes as a defense to prosecution. Pet. 15-16. The FCC argues that these cases are distinguishable, because they involved a "First Amendment right to speak without a license," FCC Br. 10, which does not exist in broadcasting. But none of the cases on which we relied said there was a First Amendment right to speak without a license. Quite the contrary. *Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 755 (1988) (cited at Pet. 16), said that an unlicensed speaker could challenge a licensing scheme even if the licensed speech could be entirely prohibited. *Id.* at 762-63 (even if a total ban on newsracks would be valid, the challenged news rack licensing scheme would nevertheless remain unconstitutional). Rejecting the right to speak

without a license, it observed that "[o]f course, the city may require periodic licensing, and may have special licensing procedures for conduct commonly associated with expression." *Lakewood*, 486 U.S. at 760. Far from holding there is a right to speak without a license, the other decisions we cited stand for the principle that licensing schemes are permissible when they contain "narrow, objective, and definite standards to guide the licensing authority." *Shuttlesworth*, 394 U.S. at 150-51 (1969), *citing Lovell v. Griffin*, 303 U.S. 444 (1938), *Schneider v. State*, 308 U.S. 147, 163-65 (1939), *Staub v. Baxley*, 355 U.S. 313 (1958). *See* Pet. 15 (citing these cases).

The NAB argues that cases outside the broadcasting context are "inapposite" in a broadcast case such as this one, since the right to broadcast, unlike the right "to speak, write, or publish," is not "unbridgeable [sic]." NAB Brief at 7. But broadcast speech is not unique in being subject to more regulation than ordinary speech. So, too, are the parades and picketing that was involved in the cases we cited, such as *Shuttlesworth*, which overturned convictions for violating a parade licensing scheme. *Shuttlesworth* conceded that "'the First and Fourteenth Amendments [do not] afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching, and picketing in the streets and highways, as those amendments afford to those who communicate ideas by pure speech.'" 394 U.S. at 152, *quoting Cox v. Louisiana*, 379 U.S. 536, 555 (1964). Yet it held that, in even in this highly regulated context, a person faced with "an unconstitutional licensing law may ignore it and engage with impunity in the exercise of the right of free expression for which the law purports to require a license." *Shuttlesworth*, 394 U.S. at 151.

In short, the fact that the Constitution may permit more regulation of broadcasters than other speakers is no reason to insulate broadcast speech restrictions from scrutiny when they are in fact unconstitutional. This Court has allowed other highly-regulated speakers to rely on the unconstitutionality of licensing schemes as a defense to prosecution, even when they operate without a license. For example, *Freedman v. Maryland*, 380 U.S. 51 (1965), overturned a movie theater operator's conviction for showing an unauthorized movie, even though the defendant had not attempted to obtain a permit for it, since the licensing scheme was unconstitutional. It did so even though the Court had earlier upheld a licensing requirement for movies that would have been invalid in other contexts. *Times Film Corp. v. City of Chicago*, 365 U.S. 43, 49 (1961) (upholding requirement that all movies be reviewed by a board of censors prior to their exhibition, and observing that movie theaters had a potentially greater "capacity for evil" in widely disseminating obscene matter, which justified a greater "scope of community control," and prevented movies from being "subject to the precise rules governing" other kinds of speech). But the heightened regulation of movie theaters did not prevent the *Freedman* defendant from operating without a license and then relying on the licensing law's unconstitutionality as a defense. An unlicensed speaker, the Court held, could challenge the licensing law regardless of "whether or not his conduct could be proscribed by a properly drawn statute, and whether or not he applied for a license." *Freedman*, 380 U.S. at 56.

C. Respondents argue that the microbroadcasting ban is narrowly tailored to preventing interference. NAB Br. 15-16; FCC Br. 11-12. But they cannot dispute that the microbroadcasting ban gratuitously wasted spectrum. Since a microbroadcaster can fit in a gap in the

electromagnetic spectrum that is too small to fit a regular broadcaster, there is space in the electromagnetic spectrum to accommodate thousands of microbroadcasting stations, without interfering with the signals of other radio stations, as the FCC itself has conceded. *See* Pet. 19-20.

The fact that a given area might sometimes be more efficiently served by a single full-power station than by many microbroadcasters, as the NAB argues, NAB Br. 17-18, *citing In re Dunifer*, 11 FCC Rcd 718, 724 (1995), is no reason to preclude a microbroadcaster from operating in gaps in the spectrum between full-power stations that are simply too small to accommodate an additional full-power station. We have never argued that the FCC should replace existing full-power stations with microbroadcasters, or stop issuing full-power licenses, only that it should not have banned microbroadcasters -- especially where only they can fill a gap in the spectrum.[1]

The NAB's arguments for upholding the ban are contradictory. First, it claims that a ban is narrowly-tailored because it would be too difficult to evaluate microbroadcasting applications on a case-by-case basis. NAB Br. 17. Then, it argues that the ban is narrowly-tailored because the FCC is empowered to grant waivers of the ban. NAB Br. 17 n.15. *See also* FCC Br. 3-4.

The first argument provides no justification for

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[1] *See also Creation of a Low-Power FM Radio Service*, 15 FCC Rcd 2205, 2211 (¶ 11) (2000) (Report and Order) (microradio stations operating at 10 watts "can be sited" in gaps in the spectrum where higher-power, 100 watt stations cannot fit). Moreover, microradio stations can operate provisionally where there is not yet a market sufficient to sustain a full-power radio station. *See id.* at 2231 (¶ 65).

discriminating against micro-broadcasters. The NAB does not claim that evaluating the potential interference of microbroadcasters is any harder than evaluating the potential interference of full-power broadcasters. The FCC is perfectly capable of adopting general rules (as it ultimately did) that obviate the need for evaluating interference on a case-by-case basis by using minimum distance separation methods similar to those it uses for full-power broadcasters. *See Creation of a Low-Power FM Radio Service*, 14 FCC Rcd 2471, 2482 n.40 (1999) (Notice of Proposed Rulemaking); *Creation of a Low-Power FM Radio Service*, 15 FCC Rcd 2205, 2233-34 ¶ 70 (2000) (Report and Order).

The second argument is conspicuously inconsistent (once again) with the decision of the court below, which NAB purports to defend. NAB instead relies on *Prayze FM v. FCC*, 214 F.3d 245 (2d Cir. 2000), which denied a preliminary injunction against the microbroadcasting ban, reasoning that it might very well meet the constitutional requirement of "narrow tailoring" because microbroadcasters could always seek a waiver of the ban when its application was unnecessary. *Id.* at 253 (citing the "existence of the waiver provision"). *Prayze* was mistaken in suggesting that there are exceptions to the ban. The court below pointed out that seeking a waiver is futile: despite an enormous amount of speakers seeking to operate a microradio station, the FCC has always denied waivers, except once to a remote Navajo-speaking community in New Mexico. *Grid Radio*, 278 F.3d at 1319 (Pet. App. A9); *see also* C.A. App. 153-158 (showing denials of waiver requests); C.A. App. 159 ("The Commission receives thousands of inquiries (well over 13,000 per year!) from individuals and groups wishing to start a 'low power' or 'micro power' radio station"). A speech restriction's

overbreadth cannot be cured by a single isolated exception in over two decades.

Curiously, the FCC never explains why it thinks a blanket ban on microbroadcasters was narrowly-tailored to preventing interference. It just recites the fact that the FCC believes that it was narrowly-tailored. FCC Br. 11. Of course, the fact that an agency thinks its own regulation is constitutional is not binding on this Court, which has an independent duty to decide constitutional questions.[2]

CONCLUSION

For these reasons, and those stated in the Petition, this Court should grant the petition for certiorari.

Respectfully submitted,

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[2] *See Sable Communications v. FCC*, 492 U.S. 115, 129 (1989). The FCC also cites three decisions it describes as "upholding enforcement orders preventing microbroadcasters from broadcasting without a license," FCC Br. 12 n.6. But these rulings are irrelevant, since they turned on a lack of jurisdiction, not the First Amendment. *See United States v. Szoka*, 260 F.3d 516 (6th Cir. 2001) (holding that only the D.C. Circuit could hear Szoka's challenge); *United States v. Neset*, 235 F.3d 415 (8th Cir. 2000) (trial court lacked jurisdiction); *United States v. Dunifer*, 219 F.3d 1004 (9th Cir. 2000) (same).